STATE OF MICHIGAN

COURT OF APPEALS

ZERVOS GROUP, INC.,

Plaintiff/Counter-Defendant-Appellant,

v

THOMPSON ASPHALT PRODUCTS, INC. and MIKE THOMPSON,

Defendants/Counter-Plaintiffs/Third-Party Plaintiffs-Appellees,

and

TRANSPORTATION INSURANCE CO,

Third-Party Defendant.

UNPUBLISHED
May 2, 2006

No. 265397
Oakland Circuit Court
LC No. 02-046149-CK

Before: Hoekstra, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Plaintiff Zervos Group, Inc., appeals as of right the trial court's order denying its motion for summary disposition of its claims for fraudulent conveyance and to pierce the corporate veil, and instead granting summary disposition in favor of defendant Mike Thompson on the grounds that plaintiff's claims under the Uniform Fraudulent Transfers Act (UFTA), MCL 566.31, *et seq*. were time-barred. We affirm in part, reverse in part, and remand.

I. Basic Facts and Procedural History

This case arises from the December 14, 2001 sale of the business assets of defendant Thompson Asphalt Products, Inc., an asphalt paving and paving products company founded by

defendant Mike Thompson.[1] It is not disputed that plaintiff provided insurance services for Thompson Asphalt, a substantial portion of the premiums for which remained unpaid at the time of the December 2001 sale. When the company failed to pay the balance of its account from the proceeds of the sale of its business assets, plaintiff filed the instant suit alleging, among other things, breach of contract by Thompson Asphalt and fraudulent conveyance of the proceeds of the asset sale by the company's president and sole shareholder, Mike Thompson.

Relying on evidence that approximately $553,000 of the $3.5 million received by Thompson Asphalt for the sale of its assets was paid to defendant's father, George Thompson, allegedly in satisfaction of a promissory note issued by Thompson Asphalt, plaintiff moved for summary disposition of its claims for fraudulent conveyance and to pierce the corporate veil under MCR 2.116(C)(10). In doing so, plaintiff argued that because the $553,000 payment to George Thompson satisfied a debt that was in fact only personal to defendant, Thompson Asphalt received nothing of value in exchange for the payment, which was therefore fraudulent as to plaintiff under §§ 4(1) and 5(1) of the UFTA, both of which render fraudulent as to a creditor any transfer made by a debtor "[w]ithout receiving a reasonably equivalent value in exchange . . . ." See MCL 566.34(1) and MCL 566.35(1).

Citing defendant's acknowledgment at deposition that Thompson Asphalt was insolvent at the time of the transfer, plaintiff further argued that the subject payment also qualified as fraudulent under § 5(2) of the UFTA, which renders fraudulent as to creditors any transfer by an insolvent debtor "made to an insider for an antecedent debt." MCL 566.35(2). Arguing further that this evidence clearly established that Thompson Asphalt was a mere instrumentality used by defendant to defraud or otherwise deny plaintiff payment of monies owed, plaintiff also asserted that the trial court should pierce the corporate veil and hold defendant personally responsible for a $93,000 judgment earlier received by plaintiff against Thompson Asphalt.

In response, defendant argued that the evidence clearly showed that George Thompson had extended the use of his personal line of credit to defendant for the sole and express purpose of rebuilding Thompson Asphalt after a July 2000 fire destroyed the company's asphalt plant, and that the money taken by defendant from that credit line was, therefore, "effectively" borrowed by the company rather than defendant. Thus, defendant argued, there was no genuine issue of material fact that the company received a reasonably equivalent value for the transfer, i.e., satisfaction of the debt incurred on its behalf, within the meaning of §§ 4(1) and 5(1) of the UFTA.

Defendant further asserted that plaintiff had failed to proffer any evidence that Thompson Asphalt was in fact insolvent at the time of the transfer, or that George Thompson had reasonable cause to believe the company was insolvent at that time, as required to establish that the transfer was fraudulent under § 5(2) of the UFTA. Thus, defendant argued that summary disposition in favor of plaintiff was not appropriate. Rather, defendant argued, summary disposition in his favor was required because plaintiff had failed to bring its claim to set aside the subject transfer

---

[1] Because plaintiff's claims against Thompson Asphalt are not at issue in this appeal, all references to "defendant" are to defendant Mike Thompson alone.

as fraudulent under § 5(2) within the one-year period set forth in MCL 566.39(b). In support of this argument, defendant presented his own affidavit, as well as that of his father, wherein the two averred that a check in the amount of $553,835.95 and made payable to George Thompson was received by defendant at the December 14, 2001 closing and delivered by defendant to his father that same day. Thus, defendant argued, because the complaint by which plaintiff asserted its claim for fraudulent conveyance was not filed until December 18, 2002, plaintiff's claim to avoid the $553,000 transfer under § 5(2) was time-barred.

At the hearing on the parties' motions, plaintiff asserted that any claim by defendant that the suit was barred by an applicable statute of limitations was improper because it was both untimely and "was never plead." In response, defendant asserted that his failure to earlier plead the limitations defense stemmed from the failure of plaintiff's complaint to identify any specific transaction to be set aside, and thus requested that he be granted leave to amend his pleadings to assert the limitations defense. The trial court granted defendant's request to amend the pleadings to assert a limitations defense and, addressing plaintiff's claim for fraudulent conveyance in light of this newly asserted defense, found that

> [t]he evidence submitted . . . demonstrates to the Court that [defendant] approved the specific transfer plaintiff complains of, the payment of $553,837, on December 14, 2001. Thus, it appears plaintiff's cause of action arose on December 14, 2001. However, plaintiff commenced this action December 18, 2002, after the one year statute of limitations had expired. Consequently, plaintiff's claim of fraudulent conveyance would be barred under MCL 566.39.

Noting that the company's general ledger "demonstrates that large amounts of money from George were deposited in the business accounts" and subsequently used for business purposes, the trial court also found that the evidence did not show that the corporation was used by defendant as a mere instrumentality. Accordingly, the trial court denied plaintiff's motion for summary disposition and, instead, granted summary disposition in favor of defendant under MCR 2.116(I)(2). The instant appeal followed the trial court's denial of plaintiff's motion for reconsideration.

II. Amendment of Pleadings to Assert Affirmative Defense

Plaintiff first argues that the trial court erred in granting defendant's oral request for leave to amend his pleadings to include the statute of limitations as a defense to plaintiff's claims under the UFTA. Specifically, plaintiff contends that, as an affirmative defense, defendant waived the statute of limitations by failing to raise the defense in his first responsive pleading. Plaintiff further asserts that defendant's delay, as well as the oral manner in which he sought to amend his pleadings for this purpose, was improper and unduly prejudicial, and that the trial court should not, therefore, have granted or otherwise entertained the request. We disagree.

A trial court's decision to grant or deny leave to amend is a discretionary matter, which this Court reviews for an abuse of discretion. *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 9; 614 NW2d 169 (2000). A trial court abuses its discretion when an unprejudiced person, considering the facts on which the trial court acted, would find no justification or excuse for the court's ruling. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 761; 685 NW2d 391 (2004).

An affirmative defense that is not raised in a party's responsive pleading, "either as originally filed or as amended in accordance with MCR 2.118," is waived. MCR 2.111(F)(3); see also MCR 2.111(F)(2). "Unless made during a hearing or trial," leave to amend pursuant to MCR 2.118 must be requested by written motion, MCR 2.119(A)(1), and should be freely granted "when justice so requires," MCR 2.118(A)(2). Moreover, because the rules governing amendment of pleadings are intended to facilitate amendment except when undue prejudice to the opposing party would result, amendment is generally a matter of right, rather than grace. See *Ben P Fyke & Sons, Inc v Gunter Co*, 390 Mich 649, 659; 213 NW2d 134 (1973). Thus, leave to amend should be denied only in the face of undue delay, bad faith or dilatory motive of the movant, or undue prejudice to the opposing party by virtue of allowing the amendment. *Cole*, *supra* at 9-10. However, absent bad faith or actual prejudice to the opposing party, delay does not alone warrant denial of a motion to amend. *Weymers v Khera*, 454 Mich 639, 659; 563 NW2d 647 (1997).

A. Waiver of Defense

This Court has held that before a defendant becomes obligated to assert an affirmative defense the plaintiff must allege facts sufficient to put the defendant on notice that the defense is applicable. See *Miller v Inglis*, 223 Mich App 159, 168-169; 567 NW2d 253 (1997). In *Miller*, *supra* at 161, the plaintiff police officer filed suit after being struck by defendant while stopped at the scene of an automobile accident. Despite having failed to raise the "fireman's rule" as a defense to the negligence action filed by the officer, the defendant successfully moved for summary disposition on the ground that plaintiff's claim was barred by the rule, which "provides that certain professionals, such as fire fighters and police officers, may *not* sue in tort for injuries sustained in the course of their employment." *Id.* at 161-162 (emphasis in original). On appeal, the plaintiff argued that summary disposition on this ground was improper because the "defendant waived the right to raise the fireman's rule as an affirmative defense because he did not raise it in his first responsive pleading." *Id*. at 168. In rejecting this argument on appeal, this Court stated:

> Pursuant to MCR 2.111(F)(3), immunity granted by law (such as the fireman's rule) is an affirmative defense that must be pleaded in a party's responsive pleading. However, pursuant to MCR 2.111(B)(1), a pleader must state specific allegations necessary to reasonably inform the adverse party of the nature of the claims that the adverse party is called on to defend. *Dacon v Transue*, 441 Mich 315, 329; 490 NW2d 369 (1992). After reviewing the complaint, we do not believe that it alleged sufficient facts to put defendant on notice that a defense of immunity of law (the fireman's rule) might be applicable to this case. Plaintiff did not plead that she was a police officer, that the accident occurred while she was on duty, or that defendant acted in a wilful or wanton manner; the complaint alleges only negligence on the part of defendant. Since defendant did not learn of the applicability of the fireman's rule to this case until discovery was underway, we see no reason why leave to amend should not be given. See MCR 2.118(A)(2). [*Id*. at 168-169.]

Here, in seeking leave to amend his pleadings to assert a statute of limitations defense, defendant argued that his failure to earlier raise the defense was attributable to the failure of plaintiff's complaint to identify the transfer claimed by it to be fraudulent or otherwise improper.

As in *Miller*, review of the complaint filed by plaintiff provides support for defendant's assertion in this regard. Although alleging generally that defendant, as an officer, director, and shareholder of Thompson Asphalt, improperly distributed the assets of the corporation for his own benefit and in violation of both the UFTA and the business corporation act (BCA), MCL 450.1101, *et seq*., plaintiff at no point in its complaint identified any specific transaction or distribution as the source for its claims in this regard. There is nothing in plaintiff's complaint to reasonably inform defendant that the fraudulent conveyance alleged by plaintiff involved a transfer of the proceeds of the sale of Thompson Asphalt to defendant's father, George Thompson. To the contrary, in asserting that defendant engaged in conduct deemed fraudulent under the UFTA, plaintiff alleged simply that "transfers from . . . Thompson Asphalt to . . . defendant *Mike* Thompson" were violative of the act. Under the circumstances of this case, such allegations are simply insufficient to "reasonably inform" defendant of the nature of the claim he was called on to defend. *Miller*, *supra* at 168.

Plaintiff asserts, however, that defendant was nonetheless timely apprised of the nature of transfer at issue, which was identified and substantively addressed as fraudulent under the UFTA in plaintiff's case evaluation brief filed some nine months before its motion for summary disposition.[2] We note too that the transfer of funds to defendant's father was also a topic developed at defendant's deposition, as well as that of both George and Marilyn Thompson – each of which were conducted shortly before case evaluation in December 2003. However, regardless whether notice sufficient to reasonably inform defendant of the nature of the transfer at issue was first given during discovery, in preparation for case evaluation, or when plaintiff moved for summary disposition of its claim for fraudulent conveyance, it remains that plaintiff failed to plead the facts necessary to give such notice in its complaint. Thus, under *Miller*, *supra* at 168-169, defendant was not obligated to assert the defense in his responsive pleading and we therefore reject plaintiff's assertion that defendant waived the statute of limitations as a defense to its claims in this matter.

B. Oral Motion and Leave to Amend

We similarly reject plaintiff's assertion that leave to amend was improperly granted because such leave was orally requested by defendant and unduly prejudicial to plaintiff. As

---

[2] Although plaintiff asserted this same fact in its motion for reconsideration of the trial court's order, the court declined to consider this "new evidence" because it was not presented to the court at the time of the October 20, 2004 hearing on the parties' motions for summary disposition. On appeal, plaintiff has appended a copy of its December 10, 2003 case evaluation brief as support for its claim that defendant had notice of the nature of its claims sufficient to afford him the opportunity to more timely seek amendment of his pleadings. This brief, however, was not presented to the trial court on reconsideration, or otherwise made a part of the lower court record. Consequently, it is not part of the record for this Court's review. See MCR 7.210(A)(1); see also *Tope v Howe*, 179 Mich App 91, 106; 445 NW2d 452 (1989) ("[m]aterials outside the scope of the record may not be considered on appeal"). In any event, as discussed below, mere delay in seeking amendment does not warrant denial of a motion to amend. *Weymers*, *supra*.

noted above, although a request for leave to amend must be made by motion, such motion need not be written where raised at "a hearing or trial." MCR 2.119(A)(1); see also *Atkins v Hartford Accident & Indemnity Co*, 7 Mich App 414, 419; 151 NW2d 846 (1967) ("when made during a trial or hearing, a motion may be made orally"). Moreover, although defendant did not move to amend its affirmative defenses until after it raised the statute of limitations defense in its motion for summary disposition, there is nothing in the record to suggest that defendant's lack of action was the result of bad faith, or that plaintiff was unduly prejudiced by the delay. *Weymers*, *supra*. To the contrary, the defense was raised more than a month before the hearing on the parties' motion for summary disposition and thus did not prejudice plaintiff's ability to respond to the issue. *Cole*, *supra* at 10. Moreover, the mere fact that an amendment might cause a party to lose is not sufficient to establish prejudice adequate to justify denial of the amendment. See, e.g., *Knauff v Oscoda Co Drain Comm'r*, 240 Mich App 485, 493; 618 NW2d 1 (2000) (such "prejudice must stem from the fact that the new allegations are offered late and not from the fact that they might cause the [opposing party] to lose . . . ."). Consequently, we find that the trial court did not abuse its discretion in allowing the amendment. Indeed, under the circumstances of this case, it cannot be said that the trial court's ruling was without justification or excuse. *Gilbert*, *supra*.

III. Statute of Limitations

A. MCL 566.34(1) and MCL 566.35(1)

Plaintiff next argues that the trial court erred in applying the one-year period of limitations set forth in MCL 566.39(b) to dismiss plaintiff's claim for fraudulent conveyance in its entirety. We agree. The interpretation and application of a statute of limitations presents a question of law, which is reviewed de novo on appeal. *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003). When faced with questions of statutory interpretation, this Court must discern and give effect to the intent of the legislature as expressed in the words of the statute. *Pohutski v Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002).

The UFTA permits a creditor to avoid or otherwise remedy the effects of a fraudulent transfer by a debtor. See MCL 566.37; see also 1998 PA 434, preamble. The requirements for obtaining such relief are set forth in §§ 4 and § 5 of the act, which define the circumstances under which a transfer or conveyance by a debtor will be deemed to be "fraudulent" within the meaning of the act. See MCL 566.34 and MCL 566.35. As with all claims for relief, however, the ability to obtain relief from such transfers is subject to a period of limitations. The time period in which a creditor may seek relief under the UFTA is set forth in § 9 of the act, which provides:

> A cause of action with respect to a fraudulent transfer or obligation under this act is extinguished unless action is brought under 1 or more of the following:
>
> (a) Sections 4(1)(a) and (b) and 5(1), within the time period specified in . . . MCL 600.5813 and 600.5855.
>
> (b) Section 5(2), within 1 year after the transfer was made or the obligation was incurred. [MCL 566.39.]

As previously noted, in seeking summary disposition of its claim for fraudulent conveyance plaintiff asserted that there was no genuine issue of material fact that the transfer between Thompson Asphalt and George Thompson was fraudulent as defined by §§ 4(1), 5(1), and 5(2) of the UFTA. The trial court, however, denied plaintiff's motion and instead granted summary disposition in favor of defendant on the ground that plaintiff had failed to bring its claim under the UFTA within the one-year period set forth in § 9(b) of the act. As argued by plaintiff, however, the period of limitation set forth in § 9(b) plainly applies only to a cause of action brought under § 5(2). Actions under §§ 4(1) and 5(1) of the UFTA are expressly subject to "the time period specified in . . . MCL 600.5813," which requires that an action be brought within a period of six years after the claim accrues.[3] MCL 566.39(a).

Although plaintiff challenged the applicability of § 9(b) to its claims that the transfer at issue here was also fraudulent under §§ 4(1) and 5(1), the trial court summarily rejected the argument on the ground that plaintiff alleged only a single count of "fraudulent conveyance." However, nothing in the UFTA restricts a single transfer or conveyance from meeting the requirements of fraudulence under more than one provision of the act. Furthermore, it is well settled that a plaintiff may allege more than one theory of liability with regard to the same set of facts, and may pursue all available remedies, even if legally inconsistent. See MCR 2.111(A)(2)(b). Given this fact, and considering that there is no dispute that plaintiff brought its cause of action under the UFTA within six years of the time its claim accrued, we find that the trial court erred in applying the one-year period of limitations set forth in § 9(b) to dismiss as time-barred plaintiff's claim that the transfer at issue here was fraudulent under §§ 4(1) and 5(1) of the act.

B. MCL 566.35(2)

Although acknowledging the applicability of § 9(b) to its claims under § 5(2) of the UFTA, plaintiff also argues that the trial court erred in dismissing its claim that the transfer at issue here was fraudulent under § 5(2) on the ground that its complaint was filed outside the one-year period set forth § 9(b). Specifically, plaintiff argues that the trial court erred in reaching the limitations issue because there existed disputed questions of fact concerning when the transfer in fact occurred. Again, we agree.[4] This Court reviews a trial court's determination that a claim is barred by the statute of limitations de novo. *McKiney v Clayman*, 237 Mich App 198, 200-201; 602 NW2d 612 (1999).

---

[3] MCL 600.5855 provides that the limitations period is tolled when a party conceals the fact that a plaintiff has a cause of action, and is not applicable here.

[4] Plaintiff also argues that the trial court erred in determining that the claim at issue here accrued on "approval" by defendant of payment to his father of funds received by the company at the closing. However, although plaintiff is correct that there is nothing in the UFTA to support the trial court's determination in that regard, we find that given the factual deficiency of the record currently before this Court, a determination regarding when a "transfer" occurs under the UFTA would be gratuitous and is thus unwarranted. Therefore, we decline to address the legal question regarding when the transfer at issue here occurred for purposes of the UFTA, and leave that issue for argument by the parties following development of the record on remand.

The date that a cause of action accrues for statute of limitations purposes is generally a question of fact for the jury. See *Flynn v McLouth Steel Corp*, 55 Mich App 669, 671-673; 223 NW2d 297 (1974). Thus, when determining whether a party is entitled to judgment as a matter of law on the ground that the plaintiff's claim is time-barred, "a court must accept as true a plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in the plaintiff's favor." *Farm Bureau Mutual Ins Co v Combustion Research Corp*, 255 Mich App 715, 720; 662 NW2d 439 (2003); see also MCR 2.116(G)(5). Only "[w]here there are no factual disputes and reasonable minds cannot differ on the legal effect of the facts, [is] the decision regarding whether a plaintiff's claim is barred by the statute of limitations . . . a question of law" for the court. *Farm Bureau*, *supra*; see also *Flynn*, *supra*.

As previously noted, a cause of action alleging that a transfer is fraudulent under § 5(2) of the UFTA must be brought "within 1 year after the transfer was made . . . ." MCL 566.39(b). In determining that plaintiff failed to bring its claim within this time period the trial court concluded that the evidence submitted by the parties demonstrated that a cause of action under the UFTA accrued on December 14, 2001, and that plaintiff's December 18, 2002 complaint was, therefore, time-barred. In reaching this conclusion, the trial court primarily relied on the December 14, 2001 closing statement indicating that $553,836 was withheld from the proceeds of the sale of the assets of Thompson Asphalt for payment on notes payable to George Thompson. As noted, however, this statement indicates merely that proceeds of the sale were withheld for such purpose, and offers no evidence concerning when the proceeds designated as payable to George Thompson were in fact transferred or otherwise distributed to him. Defendant, in seeking summary disposition, attempted to rectify this insufficiency by submitting affidavits in which both he and his father averred that a single check in the amount of $553,836.95 was issued at the December 14, 2001 closing and delivered by defendant to his father that same day. As argued by plaintiff, however, the facts asserted in these affidavits are clearly contrary to the testimony given by these parties at deposition.[5]

Indeed, in contrast to his affidavit, defendant testified at deposition that he personally distributed none of the proceeds from the sale of the company's assets, and that "all . . . distributions [listed in the closing statement] were made by the title office direct." Moreover, while defendant's testimony in this regard is consistent with distribution of the proceeds of the sale as indicated by the closing statement, George Thompson testified at deposition that he received two checks from defendant as final payment on the loan – one on December 18, 2001, and the other on December 19, 2001 – both of which he indicated were personally used by him to pay at those times the remaining balance of his line of credit account. George's testimony in this regard is supported by his credit line account statement showing credits to the account in the amount $453,836.95 on December 18, 2001, and $113,448.60 on December 19, 2001, but is

---

[5] Although plaintiff is correct that "parties may not [generally] contrive factual issues merely by asserting the contrary in an affidavit after having given damaging testimony in a deposition," *Dykes v William Beaumont Hosp*, 246 Mich App 471, 480; 633 NW2d 440 (2001) (citation and internal quotation marks omitted), the affidavits at issue here do not serve to create or otherwise "contrive" a factual issue, but rather further confound a factual dispute already present in the record.

clearly contrary to the averments offered by him in his later affidavit, as well as any inference of a single distribution of $553,836 that might reasonably arise from the December 14, 2001 closing statement. Indeed, the December 18 and 19, 2001 credits totaling more than $567,285 serve to create further questions regarding the nature and circumstances surrounding the transfer at issue here. Moreover, as recognized by the trial court, that the account was credited on these dates does not itself establish the relevant date, as the date of the credit "may be different from the date the transfer was approved and the check issued." Thus, the foregoing evidence, even when construed in favor of the plaintiff, *Farm Bureau*, *supra*, renders certain only that one or more transfers occurred at some point in time between December 14, 2001 and December 19, 2001. Accordingly, we find that a factual dispute concerning when plaintiff's claim accrued exists, and that summary disposition on the ground that the claim was time-barred was, therefore, improperly granted.

IV. Summary Disposition in Favor of Plaintiff

Plaintiff next argues that it was entitled to summary disposition of its claim that the transfer of funds at issue here was fraudulent under §§ 4(1), 5(1), and 5(2) of the UFTA. These issues have not been properly preserved for review by this Court because the trial court did not rule on them at the hearing on the parties' motions for summary disposition. See *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). However, because a motion for summary disposition concerns a matter of law and the facts necessary to the resolution of this issue have been presented to this Court, *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002), we will nonetheless address the issues.

As previously noted, plaintiff sought summary disposition of its claim for fraudulent conveyance under MCR 2.1116(C)(10). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). A genuine issue of material fact exists when, giving the benefit of reasonable doubt to the opposing party, the record leaves open a factual issue upon which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

A. Fraudulence under MCL 566.34(1)

Section 4(1) of the UFTA provides, in relevant part:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor . . . if the debtor made the transfer or incurred the obligation in either of the following:
>
> * * *
>
> (b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor did either of the following:
>
> * * *

(ii) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due. [MCL 566.34(1).][6]

Relevant to this appeal, "debtor" is defined by the UFTA as an individual or legal entity "who is liable on a claim." MCL 566.31(f). A "claim" is in turn defined by the act as "a right to payment, whether or not the right is reduced to judgment . . . ." MCL 566.31(c); see also MCL 566.31(d) ("'[c]reditor' means a person who has a claim"). Thus, insofar as it is not disputed that the "claim" at issue here derives from Thompson Asphalt's liability to plaintiff for unpaid insurance premiums, plaintiff, in order to prove that the subject transfer was fraudulent under § 4(1)(b)(ii), must show that Thompson Asphalt made the transfer (1) without receiving a reasonably equivalent value in exchange, and (2) that when doing so the company intended, believed, or should reasonably have believed that it would incur debts beyond its ability to pay as they became due.

1. Reasonably Equivalent Value

With respect to the first of these requirements, plaintiff asserts that although listed in the December 14, 2001 closing statement as monies paid by Thompson Asphalt to satisfy promissory notes held by George Thompson, the evidence clearly establishes that the debt satisfied by the $553,000 payment was in fact personal to defendant, and that, therefore, Thompson Asphalt did not receive a "reasonably equivalent value" for the transfer as contemplated by the § 4(b) of the UFTA. We disagree.

As adopted in Michigan, the UFTA does not define the term "reasonably equivalent value." Section 3(1) of the act, however, provides that "[v]alue is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred *or an antecedent debt is satisfied*." MCL 566.33(1) (emphasis added). The phrase "reasonably equivalent value," which was derived from § 548 of the federal Bankruptcy Code, 11 USC 548, has also been construed to include indirect benefits to the debtor from the transfer. See *In re Auto Specialties Mfg, Co*, 153 BR 457, 498 (WD Mich, 1993); see also *In re Image Worldwide, Ltd*, 139 F3d 574, 579 (CA 7, 1998) ("indirect benefits may be considered as part of the inquiry into reasonably equivalent value in a transaction"). Thus, to decide whether a debtor received "reasonably equivalent value" for an allegedly fraudulent transfer, all aspects of the subject transaction must be examined in order to determine the value of the benefits and burdens to the debtor, both direct

[6] Section 4(1)(a) of the UFTA also renders fraudulent any transfer made by a debtor "[w]ith actual intent to hinder, delay, or defraud any creditor of the debtor." MCL 566.34(1)(a). Although plaintiff alleged in its complaint that the transfer at issue here was made with such intent, plaintiff does not argue on appeal that summary disposition is appropriate on that ground. We note further that plaintiff does not allege or otherwise assert that the transfer was fraudulent under § 4(1)(b)(i), which requires that the debtor "[w]as engaged or was about to be engaged in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction." MCL 566.34(1)(b)(i). Rather, plaintiff argues only that summary disposition was appropriate under the requirements set forth in MCL 566.34(1)(b)(ii).

and indirect. See *In re Suburban Motor Freight, Inc*, 124 BR 984, 997 (SD Ohio, 1990); see also *Silverberg v Colantuno*, 991 P2d 280, 287 (Colo App, 1998) (the determination whether "reasonably equivalent value" was received in exchange for a transfer depends upon an analysis of all the facts and circumstances of each case). Applying these principles, we find that the record leaves open a factual issue regarding whether Thompson Asphalt received a reasonably equivalent value in exchange for the subject transfer.

In arguing that the evidence establishes that Thompson Asphalt failed to receive a reasonably equivalent value for the transfer at issue, plaintiff relies on testimony given by George Thompson, who indicated at deposition that the debt at issue "involved a personal loan between my son and myself," and that no promissory note evincing the debt was ever given him by the company. Plaintiff also cites the deposition testimony of the company's bookkeeper, Marilyn Thompson, who indicated that any debts owed by the company would have been accounted for in the company's general ledger, but that she never saw any promissory note "payable to George Thompson."[7] However, in contrast to this testimony, defendant expressly testified that the money drawn from his father's line of credit constituted a loan from his father to the company, which was evinced by promissory notes executed by the company and given to his father. Although defendant also indicated that he could not produce copies of the notes, his testimony raises a credibility question not appropriately resolved on summary disposition. See *In re Handelsman*, 266 Mich App 433, 437; 702 NW2d 641 (2005). Moreover, in addition to the testimony cited by plaintiff, George Thompson also plainly testified that he extended the use of his personal line of credit to defendant for the sole and express purpose of rebuilding Thompson Asphalt after the July 200 fire, and that he expected the line to be repaid from the proceeds of the sale of the company's assets. Consistent with this testimony, the company's general ledgers show sizeable credits to company accounts, listed in the ledgers as "GT -- Short Term Loan" and "GMT – Short Term Note," to an account entitled "N/P Mthompson." Defendant testified at deposition that these and similar transactions found in the financial records of Thompson Asphalt likely represented money received by the company from his father. Marilyn Thompson also expressly testified that the $553,000 payment to George Thompson indicated on the December 14, 2001 closing statement was for money loaned by George Thompson so that the company could continue operations after the July 2000 fire, and that regardless how the title company termed that money for repayment, "it was an amount due to George" from the proceeds of the sale for funds loaned to Thompson Asphalt.

---

[7] Plaintiff also appears to rely on the fact that only $396,500 in funds arguably obtained by defendant from his father's line of credit is shown by the company's checking register to have even been deposited into the company's general checking account. However, it is not disputed that defendant first began borrowing from his father's line of credit in July 2000. The $396,500 figure to which plaintiff cites is, however, derived solely from the company's checking register for the period of January 2001 to December 2001. Moreover, although plaintiff asserts that defendant "refused" to produce a copy of the checking register for the year 2000, we note that the account statement for George Thompson's line of credit indicates that an additional $150,000 was borrowed by defendant from the line in December 2000. Thus, the implication asserted by plaintiff, i.e., that at least $150,000 of the $553,000 transfer to George Thompson was fraudulent, is not so clear as plaintiff would have this Court believe.

When viewed in the light most favorable to defendant, this testimony and evidence raises a factual question regarding whether the monies received from George Thompson's line of credit resulted in a corporate or personal obligation and, even if personal to defendant, whether Thompson Asphalt nonetheless received a benefit from the incurrence of that obligation the satisfaction of which was sufficient to constitute reasonably equivalent value in exchange for the company's transfer of more than $550,000 to George Thompson. *Walsh*, *supra*. Consequently, plaintiff was not entitled to summary disposition of its claim that the transfer was fraudulent under § 4(1) of the UFTA. *Id.*; *West*, *supra*.

2. Intent to Incur Debt Beyond Ability to Pay

Moreover, because § 4(1)(b)(ii) of the UFTA is inapplicable under the theory alleged by plaintiff, summary disposition is improper regardless whether Thompson Asphalt received a reasonably equivalent value for the subject transfer. In asserting that the transfer at issue here was fraudulent under § 4(1)(b), plaintiff interprets subsection (ii) as rendering a transfer fraudulent if, in addition to the failure of the receipt of a reasonably equivalent value in exchange, the transfer "results in the inability of the corporation to pay its debts as they become due." However, as noted above, subsection (ii) of § 4(1)(b) expressly requires a showing that the debtor, at the time of the transfer, "[i]ntended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due." MCL 566.34(1)(b)(ii). In requiring that the debtor intended, believed, or reasonably should have believed that he would "*incur* . . . debts beyond his or her ability to pay as they became due," subsection (ii) of § 4(1)(b) plainly applies only to the incurrence of an obligation, rather than a transfer, by a debtor. MCL 566.34(1)(b)(ii) (emphasis added). Thus, because the claim asserted by plaintiff rests not on an obligation incurred by Thompson Asphalt, but rather a transfer by that debtor, § 4(1)(b)(ii) is simply inapplicable to plaintiff's claim for fraudulent conveyance.[8] Summary disposition is thus improper regardless whether Thompson Asphalt received a reasonably equivalent value for the subject transfer.

B. Fraudulence under MCL 566.35(1)

Summary disposition of plaintiff's claim for fraudulent conveyance is also not warranted under § 5(1) of the UFTA, which provides that:

> [a] transfer made or obligation incurred by a debtor is fraudulent as to a creditor . . . if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at the time or the debtor became insolvent as a result of the transfer. [MCL 566.35(1).]

[8] Cf. MCL 566.34(1)(b)(i), which requires that the debtor "[w]as engaged or was about to be engaged in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction." See also, note 6, *supra*.

Thus, in order to prove that the transfer at issue here was fraudulent under § 5(1), plaintiff must again show that Thompson Asphalt made the transfer without receiving a reasonably equivalent value, and must also show either that (a) Thompson Asphalt was insolvent at the time of the transfer, or (b) that the company became insolvent as a result of the transfer. With respect to insolvency, § 2(1) of the UFTA provides that "[a] debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation." MCL 566.32(1).

The record in this matter contains no direct evidence of the assets and liabilities of Thompson Asphalt at the time of the transfer. However, as argued by plaintiff, defendant acknowledged at deposition that Thompson Asphalt's liabilities exceeded its assets at the time those assets were sold and a portion of the proceeds from that sale were transferred to George Thompson. Thus, on the record before this Court, there is no genuine issue of material fact that Thompson Asphalt was insolvent at the time of the transfer.[9] However, because, as already discussed, the record leaves open the factual question whether Thompson Asphalt received a reasonably equivalent value in exchange for that transfer, summary disposition in favor of plaintiff under § 5(1) of the UFTA is not proper. Nonetheless, because the trial court erred in granting summary disposition of this claim on the ground that it was time-barred, we remand this case to the trial court for consideration of plaintiff's claim under § 5(1).

C. Fraudulence under MCL 566.35(2)

Section 5(2) of the UFTA provides:

> A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had a reasonable cause to believe that the debtor was insolvent. [MCL 566.35(2).]

Thus, insofar as it is not disputed that the transfer at issue here was made to an insider,[10] plaintiff, in order to prove that the subject transfer was fraudulent under § 5(2), must show that at

---

[9] Although defendant asserts on appeal that at the time of the sale Thompson Asphalt possessed "significant" accounts receivable that, if collectible, would have rendered the company solvent, he provides no support for this assertion. See *Rose v National Auction Group, Inc*, 466 Mich 453, 470; 646 NW2d 455 (2002) (a party may not create a genuine issue of material fact by merely asserting conclusory statements).

[10] See MCL 566.31(g)(ii)(F), defining an "insider" for purposes of the UFTA as "[a] relative of a general partner, director, officer or person in control of the debtor." See also MCL 566.31(g)(i)(A) ("insider" includes "a relative of the debtor . . . ."). Although defendant acknowledges that George Thompson meets the definition of an "insider" for purpose of the UFTA, he asserts that summary disposition of plaintiff's claim for fraudulent conveyance was nonetheless appropriately granted in his favor because George, who was not named in the suit brought by plaintiff, was a necessary party to any claim that the transfer at issue was fraudulent. Defendant, however, cites no authority for this bald assertion. A party may not merely assert an error and leave it to this Court to search for authority to sustain or reject his position, *Wilson v*

(continued…)

the time of the transfer, Thompson Asphalt was insolvent and that George Thompson had reasonable cause to believe that the Thompson Asphalt was insolvent.

As previously discussed, defendant acknowledged during deposition that Thompson Asphalt's liabilities exceeded its assets at the time those assets were sold and a portion of the proceeds were transferred to George Thompson. Thus, on the record before this Court, plaintiff is correct that there is no genuine issue of material fact that Thompson Asphalt was insolvent at the time of the subject transfer.[11] See MCL 566.32(1). We disagree, however, that the record supports a similar conclusion regarding whether George Thompson had "reasonable cause" to believe the company was insolvent.

As support for this proposition, plaintiff relies solely on deposition testimony given by George Thompson indicating that he permitted his son's use of his credit line because, following the July 2000 fire, "things started going downhill" and became "kind of tight" for defendant. Although plaintiff is correct that the statute does not require that the insider have specific knowledge that the debtor was insolvent at the time of the transfer, we find that the mere fact that the insider was aware that the debtor was suffering financial distress some eighteen months before that transfer is insufficient to resolve the question at issue on summary disposition. Indeed, while the testimony on which plaintiff relies may provide support for a finding that there was reasonable cause for George Thompson to believe that Thompson Asphalt was insolvent at the time of the transfer, giving the benefit of reasonable doubt to the opposing party, the record leaves open a factual issue upon which reasonable minds could differ. *West*, *supra*. Consequently, plaintiff was not entitled to summary disposition of its claim for fraudulent conveyance.

V. Piercing the Corporate Veil

Plaintiff next argues that it was entitled to summary disposition of its request to pierce the corporate veil and impose liability on defendant individually. We disagree.

A court may pierce the corporate veil when it is shown that the corporation is a mere instrumentality of another individual, is used to commit a wrong or fraud, and there is resultant unjust injury or loss to the plaintiff. See *Foodland Distributors v Al-Nami*, 220 Mich App 453, 456-457; 559 NW2d 379 (1996). This Court reviews a trial court's decisions regarding summary disposition and whether to pierce the corporate veil de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003); *Foodland*, *supra*. Summary disposition under MCR

(…continued)

Taylor, 457 Mich 232, 243; 577 NW2d 100 (1998), nor may he give issues cursory treatment with little or no citation of supporting authority, *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001).

[11] Contrary to defendant's assertion, his "good-faith" belief that the price secured for the assets of Thompson Asphalt would be sufficient to cover the company's outstanding liabilities is irrelevant to the determination whether the company was in fact insolvent for purposes of the UFTA, which, as previously noted, defines a debtor as insolvent "if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation." MCL 566.32(1); see also note 9, *supra*.

2.116(C)(10) is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001).

In seeking to pierce the corporate veil, plaintiff argued below that the evidence offered in support of summary disposition showed that defendant used the assets of Thompson Asphalt to pay a personal debt to his father and, in doing so, deprived plaintiff of the ability to recover monies owed by the corporation to plaintiff. As already discussed, however, the testimony and other evidence presented by the parties raises a factual question regarding whether the monies received from George Thompson resulted in a corporate obligation of Thompson Asphalt, or a debt personal to defendant. Consequently, summary disposition of the issue whether the corporate form should be disregarded was not proper as to either party.

VI. Remaining Claims

Finally, plaintiff argues that the trial court erred in dismissing the entirety of its suit against defendant, which, in addition to plaintiff's claims for fraudulent conveyance and to pierce the corporate veil, included claims for unauthorized corporate acts and violations of the BCA not raised or addressed by the parties in their motions for summary disposition. Under the circumstances of this case, we agree.

The Michigan Rules of Court grant a trial court broad authority to resolve all issues before it. Specifically MCR 2.116(I)(1) provides:

> If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay.

Thus, where it is shown that a party is entitled to judgment on a claim as a matter of law, a trial court may grant summary disposition in favor of that party regardless whether such disposition was sought by the parties. *Id.* Here, however, in granting summary disposition and dismissing plaintiff's suit against defendant in its entirety, the trial court indicated a belief that plaintiff's claims for fraudulent conveyance and to pierce the corporate veil were all that remained in the suit. Indeed, at the outset of its comments at the hearing on the parties' motions for summary disposition, the trail court stated, "the only remaining claims in this action are plaintiff's claims of fraudulent conveyance and piercing the corporate veil against individual defendant . . . Mike Thompson." Although plaintiff attempted to rectify this misconception by raising this issue in its motion for reconsideration, the trial court declined to reinstate plaintiff's claims for unauthorized corporate acts and violations of the BCA, indicating only that plaintiff's argument for reinstatement of these claims was "unpersuasive."

Unless required by a particular rule, a trial court need not indicate the factual or legal basis for its decision on a motion, MCR 2.513(A)(5), and nothing in MCR 2.116(C) requires such findings or conclusions by the trial court in granting summary disposition in favor of a party. However, given that the grant of summary disposition of the entirety of plaintiff's suit appears, at least initially, to have been premised on the trial court's erroneous perception that there remained only those claims addressed by the parties in their motions for summary disposition, and considering that the trial court's erroneous grant of summary disposition on the

ground that plaintiff's claim for fraudulent conveyance was barred by the statute of limitation requires that this matter be remanded, we find that the trial court erred in dismissing plaintiff's claims for unauthorized corporate acts and violation of the BCA. Accordingly, plaintiff's claims in these regards are to be reinstated on remand.[12]

We affirm the trial court's grant of leave to amend defendant's pleadings to assert the statute of limitations as an affirmative defense, but reverse the trial court's grant of summary disposition in favor of defendant and remand this matter for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra

[12] Indeed, aside from his bald assertion that "dismissal of [these] claims was proper," defendant offers no argument that these claims are without merit or were otherwise properly subject to summary disposition.